Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

80-699

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

KENNETH M. WELLS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH M. WELLS
In pro per

PUBLIC DEFENDER
Sacramento County
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QUESTIONS PRESENTED

I. WHETHER THE TAXPAYER'S DEDUCTION WAS AN "ORDINARY AND NECESSARY" BUSINESS EXPENDITURE WITHIN THE MEANING OF SECTION 162(a) INTERNAL REVENUE CODE OF 1954.

II. WHETHER THE "CLEARLY ERRONEOUS" STANDARD ENUNCIATED BY THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT IS A CORRECT AND CONSTITUTIONAL STANDARD FOR REVIEW AND REVERSAL OF THE UNITED STATES TAX COURT DECISION.

III. WHETHER THE FINDINGS OF THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT INDICATE THAT THE TAX COURT DECISION ITSELF WAS "CLEARLY ERRONEOUS".

IV. WHETHER SECTION 162(a) INTERNAL REVENUE CODE, THE HOLDINGS OF THE UNITED STATES TAX COURT AND OF THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ARE SO VAGUE AND OVERBROAD THAT THE STATUS OF THE GOVERNMENT EMPLOYED PUBLIC DEFENDER, TAXPAYER, AS TO POSSIBLE DEDUCTIONS, REMAINS UNKNOWN.

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1. T.C. MEMO 1977-419

   UNITED STATES TAX COURT

   WELLS V. COMMISSIONER OF INTERNAL REVENUE

   FILED: DECEMBER 7, 1977

   (APPENDIX B)

2. MEMORANDUM OPINION NO. 78-1797

   UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

   WELLS V. COMMISSIONER OF INTERNAL REVENUE

   FILED: AUGUST 1, 1980

   (APPENDIX A)

3. DECISION UNITED STATES TAX COURT

   DOCKET NO. 6088-76

   ENTERED: FEBRUARY 1, 1978

   (APPENDIX C)

JURISDICTION

The judgment of the United States Court of Appeal for the Ninth Circuit was entered on August 1, 1980, and is set forth in Appendix A hereto.

Jurisdiction of this court is invoked by Section 7482 of the Internal Revenue Code of 1954; Article III Section 2, Fourteenth Amendment, Section 1, and the Sixteenth Amendment of the Constitution of the United States.

STATUTE INVOLVED

Section 162(a) Internal Revenue Code, 1954:

"In General. - There shall be allowed as a deduction all ordinary and necessary expenses paid or incurred during the taxable year in carrying out any trade or business,- - - -"

STATEMENT OF THE CASE

1. This appeal involves a deficiency in income tax for the year 1973 in the amount of $458.77 as found by Decision of the United States Tax Court (Appendix C).

2. Course of Proceedings Below:

   a. A deficiency was claimed by the Commissioner of Internal Revenue, Respondent, for the year 1973. After the required conferences the matter was brought to trial before The Honorable William H. Quealy, Judge, in San Francisco, California, on June 13, 1977. The evidence consisted of a Stipulation of Facts, documents introduced as evidence at the trial, and the sole testimony of Kenneth M. Wells, the Taxpayer Petitioner.

After the presentation of briefs, Judge Quealy entered his opinion upholding the Commissioner of Internal Revenue, filed December 7, 1977 (T.C. Memo 1977-419, United States Tax Court, Appendix B).

The Tax Court in its opinion stated that the position of the taxpayer was "analogous to that of a senior partner in a law firm of comparable size"; and further stated that in "such firms, an occasional luncheon meeting with the staff to discuss the operation of the firm would be regarded as an 'ordinary and necessary' expense."

The basis for a finding that the expenditures in the taxpayer's case were not "ordinary and necessary" was: "...the

(taxpayer's) law firm is the Public Defender's Office.... It was not something that the usual civil servant could afford." (T.C. Memo Page 7)

On the 1st day of February, 1978, the United States Tax Court filed his decision (Docket No. 6088-76) finding the deficiency to be in the amount of $458.77 (Appendix C).

b. A Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, from the United States Tax Court decision was filed on February 21, 1978.

Briefs were filed with the United States Court of Appeals for the Ninth Circuit and the appeal was orally argued on May 13, 1980.

The United States Court of Appeals for the Ninth Circuit filed a memorandum opinion, No. 78-1797, on August 1, 1980 (Appendix A).

The United States Court of Appeals in its opinion expressly agreed with Taxpayer Kenneth M. Wells that:

(1) A characterization of taxpayer's position as an ordinary civil servant is inappropriate (Memorandum Opinion Page 2).

(2) Taxpayer's position cannot be readily equated with that of a typical corporation executive or military officer (Memorandum Opinion Page 2).

(3) In many respects the taxpayer's position can be equated with that of a senior partner in a private law firm (Memorandum Opinion Page 2).

and concluded with: "...the inflexibility of the commissioner on this issue is puzzling and invited the appeal that Wells has taken." (Memorandum Opinion Page 2).

The United States Court of Appeals for the Ninth Circuit then affirmed the Tax Court decision on a "narrow standard of review," that is, that the Tax Court decision was not "clearly erroneous."

3. Statement of Facts:

a. Kenneth M. Wells, Petitioner, is a single man and was during the period of this action. From 1973 to the present time he has been a resident of Sacramento, California, residing in 1973 at 233 Selby Ranch Road, Apartment #2, and presently resides at 5999 Wymore Way. (Stipulation of Facts, No. 1; T.C. Memo Pages 15, 16)

b. Kenneth M. Wells timely filed Federal income tax return for the year 1973 with the Internal Revenue Service Center at Fresno, California. (Stipulation of Facts, No. 2; T.C. Memo Pages 15, 16)

c. Kenneth M. Wells was employed during 1973, and had been since 1963 by Sacramento County as its

Public Defender. The position of Public Defender for Sacramento County is a civil service position for which the petitioner was compensated by a fixed salary. (Stipulation of Facts, No. 4; T.C. Memo Pages 15, 16)

d. Kenneth M. Wells, in 1973, was responsible for the operation of a Public Defender's Office consisting of a Chief Deputy Public Defender, six supervising attorneys, up to thirty-three lawyers in all, one supervising investigator, an investigative section and clerical personnel. The attorneys in the office represented defendants in fifteen Superior Court Depart-ments and ten Municipal Court Departments in Sacramento County. (Stipulation of Facts,

No. 5, T.C. Memo Pages 15, 16; National Reporting Co., Inc. transcript dated 13th day of June, 1977, Docket No. 6088-76, hereinafter referred to as R.T., page 6, Lines 7-10)

e. That the Office of the Public Defender, in 1963, the date Kenneth M. Wells became Public Defender, consisted of seven (7) lawyers, and represented 2,007 clients. In 1973, the date of the questioned expenditures, the office consisted of thirty-three (33) lawyers plus supporting staff, and represented approximately 12,900 persons. (RT 63, Lines 19-25, P. 7, Lines 1-7)

f. The period of 1972 and 1973 was a period of readjustment from a small office to a large office. (RT P. 8 Lines 5-10;

RT P. 9 Lines 8-25; P. 10 Lines 1-3)

g. Meetings of key personnel had been at different times of day in 1972, which had proved unsatisfactory in attendance, and the luncheon meeting was instituted to encourage attendance at a period of time the attorneys were not engaged in the business of the office. (RT P. 7 Lines 14-18; P. 10 Lines 1-8; P. 36 Lines 2-14)

h. The major number of lunch meetings and dinner meetings of key personnel were held at Del Paso Country Club. (RT P.11 Lines 5-9; Stipulation of Facts No. 6; T.C. Memo Pages 15, 17)

i. The Del Paso Country Club was a very good facility for such meetings (RT P. 11 Lines

5-22; P. 18 Lines 5-6; P. 27 Lines 6-24)

j. The luncheon meetings and dinner meetings of key personnel were scheduled agenda meetings and the business of the Public Defender was transacted except for the actual time of eating the meal. The business transacted during the meetings included, but was not confined to, developing policies for supervisors, adopting uniform pleadings, methods for controlling caseload, and development of status reports. (United Stated Court of Appeals for the Ninth Circuit Memorandum Opinion No. 78-1797; RT P. 11 Lines 17-22; P. 13 Lines 15-24; P. 14 Lines 4-25; P. 15, P. 16, P. 17 Lines 1-2; P. 36 Lines 2-14)

k. The luncheon meetings and dinner meetings of key personnel were paid for by Kenneth M. Wells. (Stipulation of Facts, No. 6; T.C. Memo Pages 15, 17)

l. Kenneth M. Wells asked the office of the County Executive if the expenses were reimbursable. The expenses were not reimbursable. (RT P. 25 Lines 4-13; Stipulation of Facts, No. 8; T.C. Memo Pages 15, 17)

m. The operational policies of the Public Defender Office are set by the Public Defender and the only control over the Office of the Public Defender is budgetary. The Public Defender has no superior or supervisor in the operational control or policy making of the Office of the Public Defender. (RT P. 12

Lines 3-25; P. 13 Lines 1-9;

P. 18 Lines 15-25; P. 19; P. 20

Lines 1-22)

ARGUMENT

I

WHETHER THE TAXPAYER'S DEDUCTION WAS AN "ORDINARY AND NECESSARY" BUSINESS EXPENDITURE WITHIN THE MEANING OF SECTION 162(a) INTERNAL REVENUE CODE OF 1954.

The Public Defender, taxpayer's deduction was "ordinary and necessary" (Section 162 Internal Revenue Code of 1954) for the efficient and competent operation of a law office whose duty is to represent persons accused of crime and who do not have the economic assets to hire their own attorney. The fact that the Public Defender and the attorneys in the Public Defender Office are paid by the County government should not be controlling; the professional independence of the attorneys and the office should determine how it is viewed by all government agencies, federal, state and local.

An "ordinary and necessary" expense within the meaning of Section 162 Internal Revenue Code of 1954 is defined in Palo Alto Town and Country Village v. C.I.R. (1977) 565 F 2d 1388 as follows:

"'Ordinary' expense is one that is normally to be expected in view of the circumstances facing the business, and a 'necessary' expense is one that is appropriate and helpful to the business" (See C.I.R. v. Heininger (1943) 320 U.S. 467, 88 L. Ed,.171). All of the evidence presented at the Tax Court hearing supported the Public Defender, taxpayer's contentions. There was ample evidence that the expenses were normally expected in view of the circumstances facing the taxpayer's office and were appropriate and helpful to the business of that office. There was no conflict in the evidence. The issue is whether the position of the Public Defender is an

ordinary civil service position or whether it is an independent law office receiving funds from County government. Assigned private attorneys are allowed the deductions. A law office which is private and contracts with the County and is paid by the County for its indigent criminal business will be allowed the deduction. The real question here is whether the County employed Public Defender should be treated differently. It is the Public Defender, taxpayer's contention that he should be treated by government as an independent law office.

In all respects, save the tax decision of the United States Tax Court and the United States Court of Appeals for the Ninth Circuit herein, the Courts, Federal and State, have declared and affirmed the independence of the Public Defender from the source of his income,

from governmental control over the representation of clients, and from governmental immunity for professional malpractice for sub-standard representation of clients. (Ferri v. Ackerman (1979) __U.S.__, 62 L. Ed. 2d 355; People v. Pope (1979) 23 Cal. 3d 412; Martin v. State Bar (1978) 20 Cal. 3d 717; Ligda v. Superior Court (1970) 5 Cal. App. 3d 811; Smith v. Superior Court (1968) 68 Cal. 2d 547.) The Tax Court decision and the Court of Appeals affirmance, herein, are directly in opposition to the clear United States Supreme Court and the California Supreme Court decisions declaring the independence of the Public Defender from the government that pays them.

II

WHETHER THE "CLEARLY ERRONEOUS" STANDARD ENUNCIATED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IS A CORRECT AND CONSTITUTIONAL STANDARD FOR REVIEW AND REVERSAL OF THE UNITED STATES TAX COURT DECISION.

The "clearly erroneous" standard used by the United States Court of Appeals for the Ninth Circuit is not a constitutionally valid standard for review and reversal of a lower court decision. The standard is not supported by the authority it cites, Palo Also Town and Country Village v. C.I.R. (1977) 565 F 2d 1388, which uses those words in a context different from an inflexible standard of review: "...court agreed that the use of the plane was an 'ordinary and necessary' business expense and the Tax Court's contrary determination was clearly erroneous and will be set aside."

The standard used is a linguistic rationale which says to the litigant that

the lower court may be wrong but we are not going to do anything about it. What does "clearly erroneous" mean: merely erroneous, slightly erroneous, erroneous, or greatly erroneous, maybe erroneous or possibly erroneous? Its meaning is not susceptible to a consistent or equal definition and, therefore, in application violates equal protection of the laws as set forth in the Fourteenth Amendment to the United States Constitution.

III

WHETHER THE FINDINGS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT INDICATE THAT THE TAX COURT DECISION ITSELF WAS "CLEARLY ERRONEOUS".

The United States Tax Court based its decision against the Public Defender, taxpayer on the premise that he is a "usual civil servant." (T.C. Memo, Page 7).

The United States Court of Appeals for the Ninth Circuit disagreed with the

Tax Court's basic premise by stating that viewing the taxpayer as an ordinary civil servant is inappropriate. (Memorandum Opinion Page 2)

The United States Court of Appeals affirmed that the Public Defender position is in many ways equated with a senior partner in a private law firm (Memorandum Opinion, Page 2). The Tax Court reasoned that the deduction would be allowed as an "ordinary and necessary" expense for a senior partner in a private law firm. (T.C. Memo, Page 6)

The United States Court of Appeals opinion rejected the United States Tax Court premises adverse to the taxpayer and did not indicate any other basis, positive or negative, in the Tax Court opinion that would support the Tax Court decision. On the other hand, the Court of Appeals accepted the Tax Court statements which would allow the deduction.

The United States Court of Appeals for the Ninth District has, by its written, expressed opinion, shown that the Tax Court decision is erroneous under any meaning of the standard of "clearly erroneous" and thus should have reversed the decision of the Tax Court.

IV

WHETHER SECTION 162(a) INTERNAL REVENUE CODE, THE HOLDINGS OF THE UNITED STATES TAX COURT AND OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ARE SO VAGUE AND OVERBROAD THAT THE STATUS OF THE GOVERNMENT EMPLOYED PUBLIC DEFENDER, TAXPAYER, AS TO POSSIBLE DEDUCTIONS, REMAINS UNKNOWN.

Neither Section 162(a) Internal Revenue Code, the United States Tax Court opinion nor the United States Court of Appeals for the Ninth Circuit opinion gave the Public Defender, taxpayer a definite standard for his future tax determinations. Although the Tax Court

concedes that a governmental employee may have a business deduction under the statute, it does not inform him as to what would qualify as "necessary and ordinary" (T.C. Memo, Page 6). The Tax Court arbitrarily holds that certain expenses which may be "ordinary and necessary" for a private law office senior partner are not for the Public Defender, taxpayer.

The United States Court of Appeals opinion rejects the Tax Court statements which infer the Public Defender is an ordinary civil servant, yet affirms the Tax Court decision without indicating or implying what possible deductions are available to a Public Defender. The United States Court of Appeals in its opinion regrets that the Commissioner was not more flexible in his ruling (Memorandum Opinion Page 2), but does not give a hint, to the Public Defender, taxpayer or the

Commissioner, where and in what manner that flexibility should occur. Rather, the Public Defender, taxpayer and the Commissioner are left to guess at the future direction of that flexibility. The Public Defender, taxpayer must proceed in expensive and time consuming litigation to determine whether he has guessed correctly each time and for each deduction taken.

If there is a real and honest business deduction which can be taken by the government employed Public Defender taxpayer it should be expressed. "Ordinary and necessary" has not been interpreted with particularity by the courts. If there is no allowable deduction, then the courts should clearly indicate that such business deduction is not intended to apply to government-employed Public Defender taxpayers. The Public Defender petitioner

asks the Supreme Court of the United States to clarify his status with the Bureau of Internal Revenue; by doing so the court will clarify the status of hundreds of other Public Defenders throughout the country. (See Appendix D)

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari be granted.

DATED: October 24, 1980.

Respectfully submitted,

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FILED

AUG 1 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH M. WELLS,	)	
	)	
Appellant,	)	No. 78-1797
	)	
vs.	)	MEMORANDUM
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Appellee.	)	
	)	

Appeal from a Decision of the United States Tax Court

Before: CHAMBERS and GOODWIN, Circuit Judges, and ORRICK,* District Judge

Kenneth Wells appeals the decision of the Tax Court disallowing deductions

*The Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

(in the amount of $822.10) taken by him in his personal income tax return for 1973 when he was Public Defender of Sacramento County. In that position he supervised a staff consisting of a deputy public defender, 33 attorneys, and the supporting investigative and clerical personnel, all of whom were, like Wells, employed under the California civil service system. In 1973 it was his policy to take key staff members to lunch at a country club. It was usual to take about eight of his staff monthly; attendance was on a voluntary basis but it is clear that business was discussed. The Commissioner admits that one of the purposes of the luncheons was to discuss matters of concern to the Office of Public Defender, such as developing policies for supervisors, adopting uniform pleadings, methods for controlling caseload, development of status reports,etc.

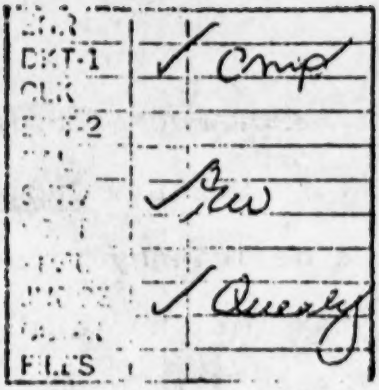
The County of Sacramento, Wells' immediate employer, does not reimburse employees for the sort of expenses in issue in this case. The Commissioner disallowed the deductions for the lunches because they were not "ordinary and necessary" expenses in carrying out his business.

We are limited in the extent of our review. We must affirm the Tax Court's determination (whether an expense is ordinary and necessary) under a clearly erroneous standard. Palo Alto Town & Country Village, Inc. v. C.I.R., 565 F.2d 1388, 1391 (9th Cir. 1977). We would agree with Wells that any glib characterization of his position as that of an ordinary civil servant is inappropriate. We would also agree with Wells that his position cannot readily be equated with that of a typical corporation executive or military officer. We would agree with

Wells that in many respects his position can be equated with that of a senior partner in a private law firm. We might offer our own view that the inflexibility of the Commissioner on this issue is puzzling and invited the appeals that Wells has taken.

But in the end we are bound by a very narrow standard of review and we cannot say that on this record the Tax Court was clearly erroneous. The decision of the Tax Court is therefore affirmed. The parties will bear their own costs.

APPENDIX B



T. C. Memo. 1977-419

UNITED STATES TAX COURT

KENNETH M. WELLS, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 6088-76 Filed December 7, 1977.

Kenneth M. Wells, pro se.

Lawrence G. Becker, for the respondent.

Served Dec. 7, 1977

MEMORANDUM FINDINGS OF FACT AND OPINION

QUEALY, Judge: Respondent determined a deficiency in petitioner's Federal income tax for the taxable year 1973, in the amount of $822.10. The deficiency resulted from respondent's disallowance of business and entertainment deductions taken by petitioner for business luncheons and a percentage of his country club dues.

The questions remaining for decision are as follows:

(1) Whether it was an "ordinary and necessary" expenditure within the meaning of section 162(a)[1] for petitioner to pay for various lunches and dinners of his staff members.

(2) Whether petitioner has substantiated that his use for business purposes of the Del Paso Country Club

---

[1] All statutory references are to the Internal Revenue Code of 1954, unless otherwise indicated.

exceeded 50 percent of his total use of the club during the year in issue.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

At the time of the filing of the petition herein, Kenneth M. Wells, hereinafter referred to as petitioner, resided in Sacramento, California. Petitioner filed his Federal income tax return for the taxable year 1973 with the Internal Revenue Service Center, Fresno, California.

During the year in issue, petitioner was employed by Sacramento County, California, as its Public Defender. The Public Defender's position is a civil service position for which petitioner was compensated by a fixed salary.

As Public Defender, petitioner was responsible for supervising an office

staffed with a Deputy Public Defender, six supervising attorneys, up to 33 attorneys, one supervising investigator and clerical personnel.

On the average, petitioner took eight key staff members to lunch once a month and periodically took two or three staff members and their wives or friends to dinner. One of the purposes of these gatherings was to discuss the operation of the Public Defender's office.

The luncheons and dinners were not held in private rooms but instead in the general dining area of the Del Paso Country Club or a public restaurant. The Del Paso Country Club had facilities other than the dining room, including a golf course. Petitioner made use of such facilities.

The County of Sacramento reimburses county employees for certain expenses incurred by employees in carrying out their official duties. Petitioner did

not ask for, or receive from the county reimbursement for the expenditures here in issue. For purposes of decision, it may be assumed that the expenses claimed by petitioner were not deemed to be reimbursable.

Petitioner had other income from teaching and royalties from published books during the year.

Petitioner expended $1,236.20 for the aforementioned luncheons and dinners and $624.00 dues on account of membership in the Del Paso Country Club. Petitioner deducted the cost of the meals and $408.00 of the cost of his membership dues.

OPINION

During 1973, petitioner was the Public Defender for Sacramento County, California. As the Public Defender, petitioner supervised a large office staff. Approximately once a month petitioner took a number of the key employees under his

supervision to lunch at a country club, of which he was a member, or a public restaurant. Occasionally, petitioner took two or three staff members and their spouses or friends to dinner. Petitioner expended $1,236.20 for these meals and $624.00 for membership dues to the country club during 1973.

Petitioner deducted the cost of the meals for himself and his staff (including on occasion, their spouses) and $408.00 of a total of $624.00 paid in membership dues. Petitioner contends these expenditures were ordinary and necessary business expenses and therefore are deductible under section 162(a).

Section 162(a) provides for a deduction for ordinary and necessary expenses incurred in the carrying on of a trade or business. Inherent in the phrase "ordinary and necessary" is the element of reasonableness. To the extent

that an expense is unreasonable, it will not be allowed as a deduction. See Commissioner v. Lincoln Electric Co., 176 F. 2d 815 (6th Cir. 1949), cert. denied 338 U.S. 949 (1950).

What is an ordinary and necessary business expenditure must, to some degree, be left to the discretion of the individual. Merely because petitioner is employed by the county government does not mean he cannot incur deductible business expenses.

Petitioner has responsibility for the operation of the Public Defender's office, with supervision over 33 attorneys. His position was analogous to that of a senior partner in a law firm of comparable size. In such firms, an occasional luncheon meeting with the staff to discuss the operation of the firm would be regarded as an "ordinary and necessary" expense. Likewise, an expenditure, whether for a

luncheon or otherwise to mark an anniversary, retirement or other occasion for an employee, might likewise be deemed "ordinary and necessary" as these terms are used in the statute. Such expenditures aid in building morale and loyalty and serve as an inducement for others to work more efficiently.

In this case, however, the law firm is the Public Defender's office. The county government does not provide funds for that type of activity. Petitioner chose to defray the cost of luncheons and dinners for his subordinates on a regular basis. It was not something that the usual civil servant could afford. While some benefit may have accrued to the office of the Public Defender, on the facts before the Court, such expenditures do not qualify as "ordinary and necessary" expenses of petitioner, individually, in his position as supervisor of that office.

Petitioner also deducted $408 of the $624 he paid in membership dues to the

Del Paso Country Club. Section 274(a) 2(A) provides, in part, that social club dues are to be treated as a deduction with respect to "facilities." Section 274(a)(1)(B) provides in part, that no deduction will be allowed unless the taxpayer established the facility was used primarily for the furtherance of the taxpayer's trade or business.

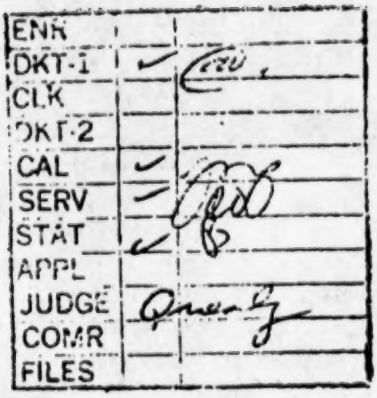
Section 1.274-2(e)(4)(iii)(a), Income Tax Regs., sets forth the criteria for "primary use" of a facility as follows:

> (iii) Entertainment facilities in general. A taxpayer shall be deemed to have established that--
>
> (a) A facility used in connection with entertainment, such as a * * * country club, golf club or similar social, athletic, or sporting club or organization, * * *
>
> was used primarily for the furtherance of his trade or business if he establishes that more than 50 percent of the total calendar days of use of the facility by, or under authority of, the taxpayer during the taxable year were days of business use. * * *

The petitioner relies on his use of the country club for the staff luncheons and dinners to show a primary business use. Since we have held that the expenditures failed to meet the business purpose test, the Court must also sustain respondent on the question of the deductibility of the country club dues.

Decision will be entered under Rule 155.

APPENDIX C



UNITED STATES TAX COURT

KENNETH M. WELLS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 6088-76
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

DECISION

Pursuant to the opinion of the Court filed December 7, 1977, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1973 in the amount of $458.77.

S/Quealy
Judge

Entered: Feb.1,1978

APPENDIX D

NATIONAL LEGAL AID & DEFENDER ASSOCIATION
1625 K Street, N.W.
Eighth Floor
Washington, D.C. 20006

September 20, 1980

Mr. Kenneth Wells
Public Defender
700 8th Street
Room 0270
Sacramento, CA 95814

Dear Mr. Wells:

You have requested that NLADA supply you with information regarding the number of public defender offices in the United States and a breakdown of the structure of those offices. As you are aware, there are various types of which consider themselves "public defenders". One of the common models is an office which is a state or county agency in which the employees are salaried. A second model is a non-profit corporation which contracts with a governmental unit to provide public defender services and in which all of its employees are salaried. Our records indicate that there are approximately 300 of these two types of offices in the United States. In addition, there are a significant number of private lawyers who provide representation to indigent criminal defendants on some systematic basic. In some instances this is by formal contract with a governmental agency, while in other situations this is by informal agreement with the courts involved whereby a law firm or several law firms agree to accept all indigent appointments on a per-case or flat fee basis. Our information indicates that there are approximately 400 of these types

of arrangements in the United States, although they vary quite widely. There is also some overlap so that in a given jurisdiction there may be a formal public defender office, an assigned counsel office with a contract with the county or state, and individual attorneys appointed on an ad hoc, case by case basis.

According to our research there are approximately 900 jurisdictions in the United States which appoint counsel to represent indigent defendants. Our best estimate is that there is between 450 and 600 formal public defender offices or formal mechanisms for assigning law firms or individual lawyers. In the remaining jurisdictions the appointment of counsel in indigent cases is done on an ad hoc, case by case basis of individual lawyers in the jurisdiction by the court.

I trust this information is of value and assistance to you.

Yours very truly,

S/ Howard B. Eisenberg

Howard B. Eisenberg
Executive Director

HBE/sgd

No. 80-699

In the Supreme Court of the United States

OCTOBER TERM, 1980

KENNETH M. WELLS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether the decision below correctly held that the cost of certain luncheons and dinners paid for by petitioner and a portion of his country club dues were not deductible by him as ordinary and necessary expenses of his trade or business.

The pertinent facts may be summarized as follows: During the year in issue (1973), petitioner was employed as the Public Defender of Sacramento County, California. The incumbent of that office is a state civil servant compensated by a fixed salary. Petitioner supervised a staff consisting of a deputy public defender, six supervising attorneys, up to 33 staff attorneys, one supervising investigator and clerical personnel, all of whom were likewise employed under the state civil service system (Pet. App. A-2, A-3; I-R.

16-17; II-R. 11-16, 21-22).[1] Petitioner was a member of the Del Paso Country Club, a dining and golf facility, and during 1973, took approximately eight staff members to the club for lunch each month. One purpose of the luncheons was to discuss matters of concern to the Office of the Public Defender, such as developing policies for supervisors, adopting uniform pleadings and methods for controlling case load, development of status reports regarding cases in the office and the like. Attendance at the luncheons was voluntary. During the year in issue, no staff meetings were held other than these luncheons, although a conference room was available for such purpose in petitioner's office building. On two or three occasions during the year, petitioner also tok members of his staff and their spouses and friends to the club for dinners and drinks. While the County of Sacramento reimbursed its employees for business expenses incurred in carrying out their official duties, expenses of the type here in issue were not reimbursable (Pet. App. A-2 to A-3; I-R. 16-17; II-R. 11-16, 21-22, 24-30).

On his 1973 income tax return, petitioner claimed business expense deductions of $1,236.20, representing the cost of these luncheons and dinners, and $408 of the $624 paid as dues for membership in the Del Paso Country Club. On audit, the Commissioner disallowed these deductions. The Tax Court upheld the Commissioner's determination on the ground that, while the expenses might have resulted in some benefit to the Office of the Public Defender, they were not ordinary and necessary expenses of petitioner's own trade or business as the publicly employed supervisor of that office (Pet. App. A-9 to A-12).[2] The court of appeals affirmed (Pet. App A-4).

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[1]"I-R." and "II-R." refer to the two-volume duplicated record in the court of appeals.

[2]The Tax Court also sustained the Commissioner's disallowance of petitioner's club dues (Pet. App. A-14). Section 274(a)(1)(B) of the

1. The decision below correctly disallowed petitioner's deduction of his entertainment expenses. Section 162(a) of the Internal Revenue Code of 1954 (26 U.S.C.) permits as a deduction "the ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business * * *." The determination of what expenses are ordinary and necessary is factual and necessarily turns on the facts and circumstances of the case. The burden is on the taxpayer to prove the validity of his claimed deductions. *Pacific Grains, Inc.* v. *Commissioner*, 399 F. 2d 603 (9th Cir. 1968); *Gilman Paper Co.* v. *Commissioner*, 399 F. 2d 697 (2d Cir. 1960). The courts of appeals are obliged to affirm such factual determinations, unless they are clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278, 290-291 (1960).

Petitioner's status as an employee of the County of Sacramento, compensated by a fixed salary, is similar to that of a corporate officer. It is settled that, for tax purposes, such a salaried corporate officer is engaged in a trade or business separate and distinct from that of his corporation, *i.e.*, the business of rendering services for compensation. *Fischer* v. *United States*, 490 F. 2d 218 (7th Cir. 1973); *Noland* v. *Commissioner*, 269 F. 2d 108, 111 (4th Cir.), cert. denied, 361 U.S. 885 (1959); *Folker* v. *Johnson*, 230 F. 2d 906, 908-909 (2d Cir. 1956). Thus, Section 162(a) allows

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[2]Internal Revenue Code (26 U.S.C.) provides that in order to obtain a business deduction of any part of the cost of dues paid to a country club, the burden is on the taxpayer to prove that more than 50% of the total calendar days of use f the facility was for business purposes. Petitioner relied on his use of the club for the staff luncheons and dinners to show primary business use. But since the court held that these expenditures failed to meet the business purpose test, they could not be used to meet the 50% test of Section 274(a)(1)(B). Likewise, since the court of appeals affirmed the Tax Court on the first issue, it found it unnecessary to address the dues issue separately.

a deduction by a corporate employee for expenditures which are "ordinary and necessary" to the continuation of his own business of earning his pay. If, on the other hand, a corporate employee voluntarily pays expenses attributable to and for the benefit of the business of his corporation, he may not deduct them on his personal tax return. *Noland* v *Commissioner*, 446 F. 2d 926, 928-929 (8th Cir. 1971).

Petitioner's trade or business was that of rendering services to the County of Sacramento for the compensation of a fixed salary. Accordingly, he bore the burden of showing that the expenses incurred in taking members of his staff to lunch and dinner were proximately related to that business. Petitioner, however, has never alleged that his purpose in incurring these expenditures was to advance or protect his position as a salaried employee. He stressed, instead, throughout his testimony and on brief before the court below that the purpose of the luncheon meetings was to further the business of the Public Defender's office (Br. 5-9, 17-18). Thus, the expenditures bore no relationship to his own business, but rather, were for the exclusive benefit of the "Office of Public Defender," a business that is separate and distinct from petitioner's business. As the Seventh Circuit pointed out in *Fischer* v. *United States, supra*, 490 F. 2d at 221, "* * * where a corporate executive employee undertakes to discharge the responsibility of the corporation, he is not incurring an expenditure of *his* trade or business within the meaning of Section 162" (emphasis in original).

2. Petitioner contends, however, that the real issue in this case is whether the position of the Public Defender is an ordinary civil service position or whether it is an independent law office receiving funds from County government" (Pet. 14-15). As he views the matter (Pet. 19-20), the Tax Court based its decision on the premise that he was a "usual civil servant" (Pet. 18) and the court of appeals, having

rejected such a characterization (and determined instead that his position was akin to that of a senior partner in a law firm), should have reversed the Tax Court's decision as clearly erroneous.

But the Tax Court's decision did not turn on a finding that petitioner was simply a "usual civil servant." Indeed, it expressly noted that his position was, in fact, analogous to that of a senior partner in a law firm (Pet. App. A-11).[3] This would be the case, to a greater or lesser extent, with respect to virtually any publicly employed supervisor to a governmental law office.

Moreover, as both the Tax Court and the court of appeals concluded, the fact that petitioner's position may be analogous, in certain respects, to that of a senior partner of a law firm does not control as to whether the expenditures in question are ordinary and necessary expenses of the *petitioner's* trade or business of rendering services for

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[3]Implicit in the court's finding that a public defender is analogous to a senior partner is the element of independence. There is accordingly no merit to petitioner's contention (Pet. 16) that a conflict exists between the decision below and state cases declaring the independence of the public defender from the government that pays him. Petitioner's reliance (Pet. 16) on *Ferri* v. *Akerman*, 444 U.S. 193 (1979), is similarly misplaced. In holding that federal law does not immunize court-appointed counsel from malpractice actions by former clients *id.* at 199-204), the Court noted that "the primary office performed by appointed counsel parallels the office of privately retained counsel" (*id.* at 204). But the Court further pointed out (*id.* at 199-200 n.16) that the federal statute there involved provided only for compensating private counsel appointed to represent defendants in federal criminal proceedings, the Congress having rejected a proposal to establish public defender's offices. Moreover, even assuming such an analogy could be drawn between private counsel and a salaried public defender, there is nothing in the Court's opinion that would support the proposition that the independence of such public defender officers requires the allowance of ordinary and necessary business expense deductions to its salaried supervisors or staff members for personal expenditures voluntarily made by them on behalf of the office itself.

compensation. Whatever similarities there may otherwise be between petitioner's office and that of a private law firm, such similarities cease upon an examination of the underlying purpose of the expenditures in question. In the case of a private firm, such expenditures would be intended to inure to the ultimate economic benefit of the individual partners as a result of the enhanced probability that the firm would continue to prosper. But it does not follow that similar expenditures would be deductible in the circumstances of this case where there is no indication in the record that the business conducted at the luncheons and dinners served, in any way, to advance petitioner's own business of rendering services for compensation. Since they were not ordinary and necessary expenses of that business, petitioner cannot deduct them.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980